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In the

Supreme Court of the United States

October Term, 1939.

No. 34.

ESTATE OF CHARLES HENRY SANFORD, Deceased, Jennie R. Baird, Substitutionary Administratrix, c. t. a.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR REHEARING.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
OTIS T. BRADLEY,
WILLIAM A. CARR,
MARVIN LYONS,
Attorneys for the Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

ESTATE OF CHARLES HENRY SANFORD, Deceased, Jennie R. Baird, Substitutionary Administratrix, c. t. a., *Petitioner*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent*.		No. 34.

PETITION FOR REHEARING.

The petitioner herein respectfully makes application for a rehearing and reconsideration of this case. The opinion of the Court was promulgated and the judgment was entered on November 6, 1939.

The issue in this case as drawn by the Court in its opinion is whether, in the case of a gift in trust subject to reserved powers, the gift is complete for the purposes of the gift tax when the grantor terminates the right to retake or recall the corpus and income for himself (which may occur either on the creation of the trust or, following the creation, on the surrender of a reserved power to recall), or, later, when the grantor surrenders the remaining right to modify in favor of others.

In support of this petition for rehearing, the petitioner respectfully shows:

I.

In reaching its decision, it is respectfully suggested that the Court failed to interpret the gift tax provisions as part of "a unified scheme of taxation", although evidently intending to accomplish this aim.

We are here engaged in applying a statute taxing generally "the transfer * * * by gift" to a limited class of gifts, namely, gifts in trust subject to reserved powers. On page 2 of the opinion it is said that in ascertaining the exact construction of the statutes taxing gifts "it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death", and again on page 6, that the question "must be decided in conformity to the course of judicial decision applicable to a unified scheme of taxation of gifts whether made *inter vivos* or at death". Such an approach falls short of the need of "a unified scheme of taxation", for while relating the gift tax and the estate tax, it wholly fails to relate either or both to the income tax provisions, provisions which are as much a part of our "scheme of taxation" as are the gift tax or the estate tax.

This Court has said time and again that it is "a long established rule" that "the intention of the lawmaker is to be deduced from a view of every material part of the statute". *Hellmich* v. *Hellman*, 276 U. S. 233, 237. In *Helvering* v. *New York Trust Co.*, 292 U. S. 455, Mr. Justice Butler expressed the rule thus (p. 464):

"Speaking through Chief Justice Taney in *Brown* v. *Duchesne*, 19 How. 183, this court said (p. 194):

'It is well settled that, in interpreting a

statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.' "

In *Helvering* v. *Morgan's Inc.*, 293 U. S. 121, 126, Mr. Justice Stone, citing *Helvering* v. *New York Trust Co., supra,* said:

> "But the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part."

In applying one section of our revenue acts to a special set of facts, surely it is essential to consider with care any other provision which is material to or may bear upon the problem. Such a rule recognizes no formal division of our revenue laws into one Title or another, or into one Part or another. It is as important to "relate" a provision in Title II with a provision in Title III as it is to relate Part I and Part II of Title III. Otherwise, an interpretation may be given to one part which, when the revenue statutes are considered as a whole, may well defeat the legislative intention.

The Court in its opinion has treated the gift tax provisions and the estate tax provisions in effect as a single tax covering transfers, whether the transfer is made *inter vivos* or by will or intestacy on death. As

we pointed out on page 55 of our main brief, we earnestly contend that, while both are excise taxes, under our present scheme of taxation the two forms of taxes are of a very different character, a contention which is borne out by Mr. Justice Stone's statement in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347, when, in speaking of the estate tax, he said:

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death * * *. It is not a gift tax, and the tax on gifts once imposed by the Revenue Act of 1924 * * * has been repealed * * *."

But even though the two taxes are considered as one transfer tax on gifts, there is still the need of studying with care the effect of Section 219 (g), since it in terms covers the very class of gifts in trust here involved. Unless the income tax rules are borne clearly in mind, there is grave danger of "harmonizing" two parts of the statute at the expense of complete disharmony with another part, and the effort to avoid "the perpetuation of inconsistency and confusion" may in reality achieve greater confusion worse confounded.

The income tax provisions in Title II are a part of our revenue statutes equally as important as are the gift and estate tax provisions in Title III. The income tax rule exemplified in Section 219 (g) is of the highest materiality in determining the intention of Congress as to how the gift tax should be applied in the case of a special class of gifts, if not indeed controlling. We are here considering the application of the gift tax in the case of a gift in trust subject to a reserved power, the very situation which Congress covered in no uncertain terms in Section 219 (g) for income tax purposes. If our revenue statutes are to

have healthy growth and cohesion, real harmony cannot be accomplished unless the statute is scanned broadly as a whole.

This Court said in the course of its opinion (p. 3) that "There is nothing in the language of the statute and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given". This, it is respectfully suggested, is a misconception. In drafting the very Revenue Act which we are here considering, Congress added Section 219 (g), which does suggest that in the case of gifts in trust, Congress may very probably have intended to impose the gift tax "before the donor had fully parted with his interest in the property given". If this were not the case, one of the declared purposes of Congress in enacting the Gift Tax Act would be defeated, as indicated by the Congressional debates to which reference is made on page 37 *et seq.* of our main brief.

Section 219 (g) of the 1924 Act, since retained without material change in our subsequent Acts and now appearing as Section 166 of the Internal Revenue Code, imposes the income tax upon the donor of a gift in trust so long as he retains "the power to revest in himself title to any part of the corpus of the trust". This exact phrase appears in Section 501 (c) of the 1932 Gift Tax Act and was adopted by the Commissioner in his 1924 and 1932 Gift Tax Regulations. The very similarity of language used in Section 219 (g), in Section 501 (c) and in the Commissioner's Gift Tax Regulations surely indicates that in applying the gift tax to cases of gifts in trust subject to reserved powers, the income tax rule applicable in the case of such trusts is of real materiality in the interpretation of the Gift Tax Act. As this Court has said, where the identical phrase ap-

pears in different parts of the same Act, it is to be presumed that the legislature has used the phrase with the same meaning, unless the context indicates that a different meaning was intended to be ascribed to it. *Helvering* v. *Stockholms etc. Bank*, 293 U. S. 84, 87 (1934).

Let us examine the actual language in these different parts of the statute and regulations. Section 219 (g) of the 1924 Act [and Section 166 of the 1932 Act] provides:

> "Where the grantor of a trust has * * * *the power to revest in himself title to any part of the corpus of the trust*, then the income * * * shall be included in computing the net income of the grantor." (Italics ours.)

Section 501 (c) of the 1932 Act provides:

> "The tax shall not apply to a transfer of property in trust where *the power to revest in the donor title to such property* is vested in the donor, * * * but the relinquishment or termination of such power * * * shall be considered to be a transfer by the donor by gift * * *." (Italics ours.)

The 1924 Gift Tax Regulations (adopted without any change of present significance in the 1932 Regulations as the Court itself said on page 7) provide:

> "The creation of a trust, where the grantor retains *the power to revest in himself title to the corpus of the trust*, does not constitute a gift * * * [but] a taxable transfer will be treated as taking place in the year in which such power is terminated." (Italics ours.)

In drafting the 1924 and 1932 gift tax Regulations, the Commissioner of Internal Revenue was acutely

aware of the relevancy of the income tax provision as it bore on the intention of Congress in imposing a gift tax on gifts in trust, for such gift tax regulations specifically cover the treatment of "the annual income of the trust", and provide that such trust income shall be taxable as a gift by the grantor so long as he retains "the power to revest in himself title to the corpus". As in the case of a primary transfer in trust, the implication is equally clear that *when* a taxable transfer of the corpus occurs, the income of the trust is taxable income to the beneficiaries and its payment over does not subject the transferor to a gift tax. This has been the consistent practice of the Commissioner in adjusting cases involving such income.

The presence of the identical phrase, first, in Section 219 (g) of the 1924 Act, then in the Commissioner's 1924 gift tax Regulations, and again in Section 166 [the counterpart of Section 219 (g)] and in Section 501 (c) of the 1932 Act, shows the care with which Congress and the Commissioner related the gift tax provisions to the income tax provisions in gifts of this character. The significance of this interrelation is emphasized by the retention of the same language in Section 166 of the subsequent income tax Titles.

In view of the origin and history of the phrase under consideration in the two parts of the same statute, it is respectfully suggested that the Court in reaching its decision failed to give sufficient attention to the presence and effect of Section 219 (g) as it bears on the interpretation of the tax on gifts in trust subject to reserved powers.

The meaning of the phrase "the power to revest in himself title to any part of the corpus of the trust" as used in Section 219 (g), is, we submit, without

any possible ambiguity in meaning, particularly when read in the light of the Commissioner's regulations construing this section, not only under the 1924 Act but under all subsequent Acts. Article 347 of Regulations 65 under the 1924 Act provides that so long as the grantor retains "the power to revest in himself title to any part of the corpus of the trust", the income of such part is taxable to him, and then continues—

> "Where the grantor relinquishes during the taxable year his power to revest in himself title to the corpus of the trust, the income of the trust shall be taxable to the grantor only for the period during which he had such power."

The same language appears in Article 347 of Regulations 69 under the 1926 Act, in Article 881 of Regulations 74 under the 1928 Act, and in Article 881 of Regulations 77 under the 1932 Act. In Article 166-1 of Regulations 86 under the 1934 Act, as originally promulgated, the language was somewhat modified, but the same test was continued. Article 166-1 provides:

> "(b) *Test of taxability to the grantor.*—The sufficiency of the grantor's retained interest in the corpus resulting in the taxation of its income to the grantor is determined by a single test, namely, whether the grantor has failed to divest himself, permanently and definitively, of every right which might by any possibility enable him once more to possess and enjoy in title the trust corpus."

Conversely, the article provides—

> "If the grantor strips himself permanently and definitively of every such interest in the corpus retained by him, the income of the trust realized

after the effective date of such divesting is not taxable to the grantor but is taxable as provided in Sections 161 and 162."

Regulations 86 were subsequently amended to bring them into conformity with Article 166-1 of Regulations 94 under the 1936 Act, which provided—

> "For the purposes of this article the grantor is deemed to have retained such power if he * * * may cause the title to the corpus to revest in the grantor."

and again—

> "On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his property, creates the trust in order to conserve the property, not for himself but for the donees, who will ultimately enjoy it, the provisions of Sections 161, 162, and 163 are applicable."

Article 161-1 of Regulations 101 under the 1938 Act, the last complete regulations which the Commissioner has issued, prescribes the same rule.

The income tax rule of section 219 (g) and the Commissioner's income tax Regulations were considered and sustained by this Court in *Corliss* v. *Bowers,* 281 U. S. 376 (1930). In that case this Court had no difficulty with the meaning of the phrase. It held that so long as the grantor retained the power to revest the title in himself, he was liable for the tax on the income of the trust, since it was subject to his "unfettered command", even though the beneficiaries in fact received and enjoyed the income. Similarly, the converse of the rule has been sustained by the Circuit Court of Appeals for the Second Circuit in the *Knapp* case and in other cases cited on page 30 of

our main brief. Again the Court and the Board had no difficulty with the meaning of the phrase. On the relinquishment, said the Circuit Court in the *Knapp* case, of "the power to revest in himself title to any part of the corpus", a transfer of the corpus occurred, which shifted the liability for the income tax on the income from the grantor to the trust estate, even though the grantor retained a power to change the beneficiaries and redesignate the use and enjoyment of the income by others.

II.

It is respectfully suggested that in applying the earlier regulations and Section 501 (c) of the 1932 Act, the Court may have misconceived, as a matter of substantive law, the true character of the power which Sanford surrendered in 1919, and may have been misled by the fact that the taxable transfer in the *Sanford* case, as we conceive it, occurred prior to the enactment of the gift tax act.

On the surrender in 1919, Sanford lost the right "to withdraw principal or income from any trust". This can mean only one thing. At that point he relinquished any right *to retake for himself* principal or income. After 1919 he continued to exercise a degree of control over the use of the principal and income *for others,* but this control stopped short of any further control over it *for himself.*

Now if a settlor relinquishes the right to retake for himself the corpus or income, it follows that he has relinquished the power *to revest in himself* any *beneficial* title to or interest in the corpus of the trust, and, conversely, when he relinquishes the power to revest in himself any beneficial interest in the corpus, he

has lost the power to retake for himself the principal or income. The two phrases are identical in meaning. So long as a settlor may revest in himself the trust corpus, he may destroy the trust and retake the corpus (and hence the income) for his own uses, free and clear of any interest on the part of the beneficiaries. But, after he surrenders such a right, he no longer may enjoy *for his own uses* the *beneficial* interest in the corpus or income, even though he may control its use by others. On such a surrender there is a final shift from the settlor to others of any and all *beneficial enjoyment* of the corpus, either directly, indirectly, or through any subterfuge. For example, as a matter of substantive law, it is entirely clear that after the surrender of the power in 1919 Sanford could not designate his estate as the recipient of the corpus or income, nor could he appoint to a creditor in partial or complete cancellation of his indebtedness, nor could he appoint to anyone for a consideration. See *Matter of Carroll*, 274 N. Y. 288 (1937). If he should attempt to do so, the existing beneficiaries named in the trust would have an appropriate remedy to prevent any act in derogation of the power, since the power was a non-beneficial power in trust. However the power surrendered in 1919 may be designated, or however the power retained may be described, Sanford in 1919, as a matter of substantive law, relinquished forever and without right of recall any and all power or right to revest in himself any *beneficial* interest in the corpus and income.

Bearing in mind the true character of the power which Sanford surrendered in 1919, it is hard to see how any difficulty arises in applying the language of the Commissioner's regulations or the language Congress used in Section 501 (c) of the 1932 Act.

The regulations and the 1932 statute in terms provide that the taxable transfer occurs on the relinquishment of "the power to revest [in the grantor] title to the corpus". The word "title" necessarily means beneficial title to or interest in the corpus. This obviously is the meaning ascribed to the word "title" as used in the identical phrase in Section 219 (g). To impute to the word "title" as used in either place a meaning which excludes the conception of beneficial interest renders the phrase wholly senseless. During the course of this long litigation, at no point has it ever been suggested that the phrase in question had any other implication than that of imposing the tax at the point where the grantor relinquishes all beneficial title to or interest in the corpus for his own use.

The pattern of the Commissioner's earlier regulations and of Section 501 (c) of the 1932 Act must be applied, we respectfully submit, regardless of whether the shift or transfer in interest susceptible of sustaining the gift tax occurred prior to or during a gift tax period. The several parties and the Court itself agree that the *Hesslein* case, the *Humphreys* case, and the *Sanford* case are all controlled by the same considerations. This being the case, it is of no consequence whether the taxable transfer occurred on the creation of the trusts, as in the *Hesslein* and *Humphreys* cases, or whether, following the creation of the trusts, on the surrender by the grantor of the power to enjoy for himself the beneficial interest in the corpus; nor is it material whether the taxable transfer occurred before or during a gift tax period. In interpreting and applying the earlier regulations and Section 501 (c) of the 1932 Act, clear thinking requires that it be assumed the earlier regulations and

the statute were in effect at the time of, and at all material points following, the creation of the trust, for otherwise it cannot be said that the three cases present the same question, and, of course, a very serious miscarriage of justice would thereby occur.

III.

The Court in its opinion says (p. 7) that the Commissioner's 1936 Regulations "removed the ambiguity by declaring that the gift is complete and subject to the tax when 'the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself' ". It is respectfully suggested that the rule of the 1936 Regulations does not differ in any respect from the rule of the 1924 Regulations.

As we have said, the word "title" in the 1924 Regulations necessarily contemplates the beneficial title. This being so, the material language in the 1936 regulations and the language in the earlier regulations mean precisely the same thing. Certainly the 1936 Regulation added nothing to the meaning when it added the words "the donor has so far parted with his dominion and control", etc. This same conception is implicit in the language of the earlier regulations. Under the language of all the regulations, a gift tax attaches on the occurrence of a prescribed event, namely, on the termination of the donor's power to revest in himself any beneficial interest in the corpus, and, since the language describing the event is perfectly clear, at that point the gift in trust is complete for gift tax purposes, regardless of the retention or non-retention of any control over the use by others. Certainly from the standpoint of completeness, an irrevocable gift in trust subject only to a non-bene-

ficial power to modify in favor of others is as complete as an absolute transfer in trust with future contingencies set forth in the trust indenture. In such a case no one has ever suggested that the gift tax is postponed until the final contingencies are resolved and the beneficiaries ultimately fixed. Yet under the reasoning of the Court in its opinion, it is now extremely doubtful whether in such a case the gift is to be deemed complete on the creation of the trust, particularly in view of the secondary liability which, under the opinion, would fall on the named beneficiaries although their interests are still contingent.

IV.

On page 7 of its opinion, the Court, we respectfully suggest, misinterprets our argument. We do not maintain that the 1924 Regulation laid down any rule in cases where there was a reserved power different from or in addition to the power to revest the title in the donor. Our contention is that under the earlier regulations as under the 1936 Regulation the taxable transfer occurs on the relinquishment of the power to revest the beneficial title in the donor, and that the happening of such an event is the test of completeness of the gift for gift tax purposes, regardless of the retention of a power of control for others. If so, in the *Hesslein* case and the *Humphreys* case, the gift was complete for gift tax purposes on the creation of the trusts in 1934, and in the *Sanford* case it was complete in 1919. The absence of a gift tax in that year does not vary the rule or justify the later imposition of a tax upon Sanford in 1924 upon the surrender of the retained power of control. There is no possible ground to attribute to Sanford any intent to evade a gift tax, so no liability can arise on this score.

V.

It is respectfully suggested that the controlling phrase in the Commissioner's regulations is not necessarily equivalent to the phrase "the relinquishment of the power of revocation".

As a word of art, the word "revoke" implies, we suggest, not a taking away from the beneficiaries, but a taking back by the grantor for his own use. As in the case of any word, it is possible, of course, to attribute to the word "revoke" as used in the phrase "a power of revocation" a different and broader meaning, encompassing the right to control for others as well as the right to retake for himself. When used in the latter sense, the *relinquishment* of such a power would require the termination of all power to control, whether for the grantor or others, as distinguished from the termination of the right to retake or recall for himself. It is not entirely clear from the opinion in which sense the Court used the phrase. But, in view of the last paragraph of the footnote on page 4, the Court apparently considers that the language of the earlier regulations and of Section 501 (c) of the 1932 Act, namely, "the relinquishment" of "the power to revest in himself title to the corpus of the trust", conveys the same meaning as "the relinquishment of the power of revocation". If the phrase "the relinquishment of the power of revocation" is used in its broader meaning, we respectfully suggest that this is not the case.

The word "revoke" or "the relinquishment of the power of revocation" does not appear in either Section 219 (g), or in any of the Commissioner's gift tax regulations, or in Section 501 (c) of the 1932 Act. The word was ready at hand, for it appears in Sec-

tion 302 (d) coupled with the words "alter" and "amend". Since ready at hand and appearing in Section 302 (d), it is significant that it was not used either in the income tax provisions or the gift tax provisions. The phrase employed in both places is "the relinquishment of the power to revest in himself title to the corpus".

The conception implicit in this phrase is, we respectfully suggest, fundamentally different from the broader meaning of the phrase "the relinquishment of the power of revocation", and for evident reasons. The test for income and gift tax purposes is and was intended to be the power or lack of power in the grantor to control *for himself* the *beneficial* enjoyment of the corpus. This, we submit, is the meaning implicit in the phrase used in the gift tax regulations and in Section 501 (c) of the 1932 Act. It connotes the legal ability of the grantor to retake the corpus so that he may enjoy for himself the beneficial interest, such as the right freely to sell for a consideration and to use for himself the income free from let or hindrance. On the occurrence of the surrender of such a power the gift in trust is complete and the gift tax attaches. To ascribe to the phrase any other or broader meaning would render it meaningless, in the light of its setting and purpose in the regulations and the statute. Indeed it is somewhat startling to find this Court giving to the Commissioner's own regulations a meaning which neither the Commissioner nor his chief law officer ascribed to them, or even considering such regulations ambiguous when both the Commissioner and his chief law officer had no doubt of the meaning, as evidenced by the uniform and consistent practice in adjusting some 300 cases "of the character of that here involved".

The Circuit Court of Appeals for the Second Circuit in the *Knapp* case gave to the same phrase the very meaning which we ascribe to it, and categorically held that the event which shifted the income tax from the grantor to the trust estate was the relinquishment by the grantor of the right to retake the income for himself, even though the grantor retained the right of control over the enjoyment by others.

We appreciate that the concept of a taxable transfer for estate and gift tax purposes contemplates the shifting of the economic benefits rather than any "technical changes in title", and we would apply such a test in the case of gifts in trust subject to reserved powers. The distinction we would make is the distinction between the irrevocable transfer of those primary economic benefits in property, such as the right of use, enjoyment and disposition for the grantor's own benefit, as distinguished from the relatively less important power of control over the use by others, less important because by its nature such a power excludes any pecuniary benefits to the grantor. There is nothing incongruous in such a distinction. For some thirteen years the Commissioner uniformly applied it in administering his own gift tax regulations. Congress adopted it in drafting Section 501 (c) of the 1932 Act. It is implicit in Section 219 (g) of the income tax provisions, which still represents the declared policy of Congress. The rule for which we contend is not in any sense predicated upon "technical changes in title".

VI.

We respectfully suggest that the Court has misconceived the stipulation of record covering the uniform practice in adjusting cases of the character of

those here involved. In executing the stipulation, the purpose of the parties was to lay before the Court the consistent and uniform practice on the part of the Commissioner in adjusting all cases, some 300 in number, which involve the precise issue presented in the *Sanford* case, namely, whether in the case of a transfer in trust subject to reserved powers the Commissioner, as a matter of practice, has collected the gift tax at the point when the grantor relinquishes the right to retake for himself the beneficial interest in the corpus, or upon the termination of the retained power to modify in favor of others. Regardless of any variance in detail among such 300 cases, there can be no doubt what *in fact* were the legal issues involved. The materiality of the practice rests on consistency and uniformity in applying one test or the other. The parties did not agree or undertake to agree that thus and so was the correct interpretation of the statute. The stipulation discloses the administrative action taken in all such cases, and as such it is a stipulation of fact.

The uniformity in the administrative practice as disclosed by the stipulation is not undermined by any change of ruling in the *Sanford* case. The established practice, *vel non*, is not dependent on action in the particular case under contest. It is the variance from the practice in the case under contest which brings forward the appeal to *prior* continuity of practice.

VII.

The Court at the top of page 5 of its opinion says that our contention that the gift becomes complete and taxable upon the relinquishment of the power to retake cannot be sustained, unless the Court is to hold that a second tax will be incurred upon the relinquish-

ment at death of the power to select new beneficiaries, or unless as an alternative the rule in the *Porter* case is to be abandoned. This, we respectfully suggest, is not the case. Under our contention, the credits allowed by the estate tax sections on account of gift taxes paid on *inter vivos* transfers will largely eliminate any estate tax, although some balance will be due on account of the difference in rates. When this Court said in the *Guggenheim* case that "Congress did not mean that the tax should be paid twice", it is evident from the context that the remark had reference to a second *inter vivos* tax under the gift tax provisions and not to an estate tax following a gift tax. In the case of a gift in contemplation of death, the gift *inter vivos* when made is unquestionably subject to the gift tax, and it is also on death part of the gross estate and again taxable, subject to the gift tax credits. The reasoning of Mr. Justice Cardozo predicated on one gift tax necessarily was limited to the tax collected under the gift tax provisions.

There is nothing in our contention which casts any doubt upon the soundness of the decision in the *Porter* case, even though the decision goes to the extent of holding that the existence on death of a power of control for the use by others constitutes a transfer of property on death. All the parties to these cases agree that under the gift tax provisions Congress has the power to impose the gift tax either at the earlier or the later point, and it is a question only of which point Congress intended to select. Under our contention it would simply mean that for gift tax purposes a gift tax would be collected at the earlier point, and that, if the powers thereafter retained were still in existence on death, the property would constitute part of the gross estate, subject to the statutory credits, as in the case of a gift in contemplation of death.

VIII.

The Court evidently gave weight to the statement of the Solicitor General that he is "unable to determine which construction of the statute will be most advantageous to the Government in point of revenue." We have marshalled the evidence to the contrary based on the facts of record in this case on pages 12-14 of our reply brief. But aside from such evidence and as a matter of reasoning and sound judgment, it is implicit in the rule contended for by the taxpayer in the *Hesslein* case and in the *Humphreys* case that inevitably a substantial loss of revenue will occur, certainly so long as the income tax provisions remain as they are now drawn. We do not need to tell this Court that the taxpayers of the country have in the past and will continue in the future to seize upon any legitimate means of reducing taxes. Under the decision of this Court as it now stands, there necessarily must exist a loophole in our revenue statutes through which an incalculably large amount of income taxes will be lost. Those who were charged in the Treasury with deciding the *Sanford* case when it was before the Bureau fully recognized the dangers of the situation. Surely the responsible officials now in the Department of Justice and in the Treasury are acting under a misapprehension of fact when they say that they do not know which rule will be more advantageous to the Government.

For the future, such a result might possibly be avoided through some amendment to Section 219 (g) [now Section 166] of the income tax Title. But to accomplish the needed change, it would be necessary to impose the income tax upon the grantor even after

he had lost any right to receive or enjoy the income or principal for himself. Congress might well hesitate to impose such an onerous burden upon the taxpayers of the country, even aside from the grave constitutional question which such an amendment would present. Through the experience of years, it has proven sound in principle and sound in practice to shift the burden of the income tax from the grantor to the trust estate at the point where the grantor can no longer enjoy for himself the income. Yet under the present decision of this Court, such a rule must go by the board and a new and untried income tax rule replace it, if the Government revenues are to be preserved.

Conceivably Congress might amend the gift tax provisions and prescribe for the future the rule for which we now contend. Such a change could not be made retroactively, as we point out in the footnote of our main brief on page 32, and such action would indeed be highly inequitable, to the Government in such cases as the *Hesslein* case and the *Humphreys* case, and to the taxpayer in such cases as the *Sanford* case.

Today the assets of the Sanford estate do not exceed $20,000 in all, and are subject to a charge for administration expenses. Transferee proceedings are pending against the trustee of the trust, but the 10-year statutory lien on the property has long since expired. There are over 40 beneficiaries, many with minor life annuities. A substantial amount of the trust income is payable to non-resident aliens and the enjoyment of the remainders is still contingent and uncertain.

It is respectfully submitted that this application for a rehearing should be granted and that this case should be set down for reargument.

Respectfully submitted,

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OTIS T. BRADLEY,
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Dated: November 24, 1939.

We, the attorneys of record for the petitioner herein, certify that this petition for rehearing is presented in good faith and not for delay.

JOHN W. DAVIS,
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p. 3, 4, 7, 8, 9, 10, 11, 2

SUPREME COURT OF THE UNITED STATES.

No. 34.—OCTOBER TERM, 1939.

Estate of Charles Henry Sanford, Deceased, Jennie R. Baird, Substitutionary Administratrix, C.T.A., Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 6, 1939.]

Mr. Justice STONE delivered the opinion of the Court.

This and its companion case, No. 37, *Rasquin* v. *Humphreys*, present the single question of statutory construction whether in the case of an *inter vivos* transfer of property in trust, by a donor reserving to himself the power to designate new beneficiaries other than himself, the gift becomes complete and subject to the gift tax imposed by the federal revenue laws at the time of the relinquishment of the power. Co-relative questions, important only if a negative answer is given to the first one, are whether the gift becomes complete and taxable when the trust is created or, in the case where the donor has reserved a power of revocation for his own benefit and has relinquished it before relinquishing the power to change beneficiaries, whether the gift first becomes complete and taxable at the time of relinquishing the power of revocation.

In 1913, before the enactment of the first gift tax statute of 1924, decedent created a trust of personal property for the benefit of named beneficiaries, reserving to himself the power to terminate the trust in whole or in part, or to modify it. In 1919 he surrendered the power to revoke the trust by an appropriate writing in which he reserved "the right to modify any or all of the trusts" but provided that this right "shall in no way be deemed or construed to include any right or privilege" in the donor "to withdraw principal or income from any trust." In August, 1924, after the effective date of the gift tax statute, decedent renounced his remaining power to modify the trust. After his death in 1928, the Commissioner following the decision in *Hesslein* v. *Hoey*, 91 F. (2d)

954, in 1937, ruled that the gift became complete and taxable only upon decedent's final renunciation of his power to modify the trusts and gave notice of a tax deficiency accordingly.

The order of the Board of Tax Appeals sustaining the tax was affirmed by the Court of Appeals for the Third Circuit, 103 F. (2d) 81, which followed the decision of the Court of Appeals for the second circuit in *Hesslein* v. *Hoey, supra,* in which we had denied certiorari, 302 U. S. 756. In the *Hesslein* case, as in the *Humphreys* case now before us, a gift in trust with the reservation of a power in the donor to alter the disposition of the property in any way not beneficial to himself, was held to be incomplete and not subject to the gift tax under the 1932 Act so long as the donor retained that power.

We granted certiorari in this case May 15, 1939, and in the *Humphreys* case May 22, 1939, upon the representation of the Government that it has taken inconsistent positions with respect to the question involved in the two cases and that because of this fact and of the doubt of the correctness of the decision in the *Hesslein* case decision of the question by this Court is desirable in order to remove the resultant confusion in the administration of the revenue laws.

It has continued to take these inconsistent positions here, stating that it is unable to determine which construction of the statute will be most advantageous to the Government in point of revenue collected. It argues in this case that the gift did not become complete and taxable until surrender by the donor of his reserved power to designate new beneficiaries of the trusts. In the *Humphreys* case it argues that the gift upon trust with power reserved to the donor, not afterward relinquished, to change the beneficiaries was complete and taxable when the trust was created. It concedes by its brief that "a decision favorable to the government in either case will necessarily preclude a favorable decision in the other."

In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Section 319 of the Revenue Act of 1924, 43 Stat. 253, reenacted as Sec. 501 of the 1932 Act, 47 Stat. 169, imposed a graduated tax upon gifts. It supplemented that laid on transfers at death, which had long been a feature of the revenue laws. When the gift tax was enacted Congress was aware that the essence of a transfer is

the passage of control over the economic benefits of property rather than any technical changes in its title. See *Burnet* v. *Guggenheim*, 288 U. S. 280, 287. Following the enactment of the gift tax statute this Court in *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 (1929) held that the relinquishment at death of a power of revocation of a trust for the benefit of its donor was a taxable transfer. Cf. *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Chase National Bank* v. *United States*, 278 U. S. 327, and similarly in *Porter* v. *Commissioner*, 288 U. S. 436 (1933), that the relinquishment by a donor at death of a reserved power to modify the trust except in his own favor is likewise a transfer of the property which could constitutionally be taxed under the provisions of § 302(d) of the 1926 Revenue Act (reenacting in substance 302(d) of the 1924 Act) although enacted after the creation of the trust. Cf. *Bullen* v. *Wisconsin*, 240 U. S. 625; *Curry* v. *McCanless*, 307 U. S. 357; *Graves* v. *Elliott*, 307 U. S. 383. Since it was the relinquishment of the power which was taxed as a transfer and not the transfer in trust, the statute was not retroactively applied. Cf. *Nichols* v. *Coolidge*, 274 U. S. 531; *Helvering* v. ~~[illegible]~~ Helmholz, 296 U. S. 93, 98.

The rationale of decision in both cases is that "taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed." See *Corliss* v. *Bowers*, 281 U. S. 376, 378; *Saltonstall* v. *Saltonstall*, *supra*, 261; *Burnet* v. *Guggenheim*, *supra*, 287, and that a retention of control over the disposition of the trust property, whether for the benefit of the donor or others, renders the gift incomplete until the power is relinquished whether in life or at death. The rule was thus established, and has ever since been consistently followed by the Court, that a transfer of property upon trust, with power reserved to the donor either to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries other than himself is incomplete, and becomes complete so as to subject the transfer to death taxes only on relinquishment of the power at death.

There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. The gift tax was supple-

mentary to the estate tax. The two are in *pari materia* and must be construed together. *Burnet~~t~~ v. Guggenheim, supra*, 286. An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death.[1]

Section 322 of the 1924 Act provides that when a tax has been imposed by § 319 upon a gift, the value of which is required by any provision of the statute taxing the estate to be included in the gross estate, the gift tax is to be credited on the estate tax. The two taxes are thus not always mutually exclusive as in the case of gifts made in contemplation of death which are complete and taxable when made, and are also required to be included in the gross estate for purposes of the death tax. But § 322 is without application unless there is a gift *inter vivos* which is taxable independently of any requirement that it shall be included in the gross estate. Property transferred in trust subject to a power of control over its disposition reserved to the donor is likewise required by § 302(d) to be included in the gross estate. But it does not follow that the transfer in trust is also taxable as a gift. The point was decided in the *Guggenheim* case where it was held that a gift upon trust, with power in the donor to revoke it is not taxable as a gift because the transfer is incomplete, and that the transfer whether *inter vivos* or at death becomes complete and taxable only when the power of control is relinquished. We think, as was pointed out in the *Guggenheim* case, *supra*, 285, that the gift tax statute does not contemplate two

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[1] The gift tax provisions of the Revenue Act of 1924 were added by amendments to the revenue bill introduced on the floor of the House and the Senate. Cong. Rec., Vol. 65, Part 3, pp. 3118-3119; Part 4, pp. 3170, 3171; Part 8, p. 8094. The sponsor of the amendment in both houses urged the adoption of the bill as a "corollary" or as "supplemental" to the estate tax. Cong. Rec., Vol. 65, Part 3, pp. 3119-3120, 3122; Part 4, p. 3172; Cong. Rec., Vol. 65, Part 8, pp. 8095, 8096.

The gift tax of 1924 was repealed when Congress, concurrently with the enactment of § 302(c) of the Revenue Act of 1926, 44 Stat. 70, 125, 126, establishing a conclusive presumption that gifts within two years of death were made in contemplation of death and therefore subject to the estate tax. A gift tax was reenacted by § 501 of the Revenue Act of 1932, 47 Stat. 169, shortly after it was decided in Heiner *v.* Donnan, 285 U. S. 312, that the legislative enactment of such a presumption violated the Fifth Amendment.

Section 501(*c*) of the 1932 Act added a new provision that transfers in trust, with power of revocation in the donor, should be taxed on relinquishment of the power. This was repealed by § 511 of the Act of 1934, 48 Stat. 680, because Burnet~~t~~ *v.* Guggenheim, 288 U. S. 280, had declared that such was the law without specific legislation. H. R. No. 704, 73rd Cong., 2d Sess., p. 40; Sen. Rep. No. 558, 73rd Cong., 2d Sess., p. 50.

taxes upon gifts not made in contemplation of death, one upon the gift when a trust is created or when the power of revocation, if any, is relinquished, and another on the transfer of the same property at death because the gift previously made was incomplete.

It is plain that the contention of the taxpayer in this case that the gift becomes complete and taxable upon the relinquishment of the donor's power to revoke the trust cannot be sustained unless we are to hold, contrary to the policy of the statute and the reasoning in the *Guggenheim* case, that a second tax will be incurred upon the donor's relinquishment at death of his power to select new beneficiaries, or unless as an alternative we are to abandon our ruling in the *Porter* case. The Government does not suggest, even in its argument in the *Humphreys* case, that we should depart from our earlier rulings, and we think it clear that we should not do so both because we are satisfied with the reasoning upon which they rest and because departure from either would produce inconsistencies in the law as serious and confusing as the inconsistencies in administrative practice from which the Government now seeks relief.

There are other persuasive reasons why the taxpayer's contention cannot be sustained. By §§ 315(b), 324, and more specifically by § 510 of the 1932 Act, the donee of any gift is made personally liable for the tax to the extent of the value of the gift if the tax is not paid by the donor. It can hardly be supposed that Congress intended to impose personal liability upon the donee of a gift of property, so incomplete that he might be deprived of it by the donor the day after he had paid the tax. Further, § 321(b)(1) exempts from the tax, gifts to religious, charitable, and educational corporations and the like. A gift would seem not to be complete, for purposes of the tax, where the donor has reserved the power to determine whether the donees ultimately entitled to receive and enjoy the property are of such a class as to exempt the gift from taxation. Apart from other considerations we should hesitate to accept as correct a construction under which it could plausibly be maintained that a gift in trust for the benefit of charitable corporations is then complete so that the taxing statute becomes operative and the gift escapes the tax even though the donor should later change the beneficiaries to the non-exempt class through exercise of a power to modify the trust in any way not beneficial to himself.

The argument of petitioner that the construction which the Gove. ıment supports here, but assails in the *Humphreys* case, affords a ready means of evasion of the gift tax is not impressive. It is true, of course, that under it gift taxes will not be imposed on transactions which fall short of being completed gifts. But if for that reason they are not taxed as gifts they remain subject to death taxes assessed at higher rates, and the Government gets its due, which was precisely the end sought by the enactment of the gift tax.

Nor do we think that the provisions of § 219(g) of the 1924 Act have any persuasive influence on the construction of the gift tax provisions with which we are now concerned. One purpose of the gift tax was to prevent or compensate for the loss of surtax upon income where large estates are split up by gifts to numerous donees.[2] Congress was aware that donors in trust might distribute income among several beneficiaries, although the gift remains so incomplete as not to be subject to the tax. It dealt with that contingency in § 219(g) which taxes to the settlor the income of a trust paid to beneficiaries where he reserved to himself an unexercised power to "revest in himself title" to the trust property producing the income. Whether this section is to be read as relieving the donor of the income tax where the power reserved is to modify the trust, except for his own benefit, we do not now decide. If Congress, in enacting it, undertook to define the extent to which a reserved power of control over the disposition of the income is equivalent to ownership of it so as to mark the line between those cases on the one hand where the income is to be taxed to the donor and those on the other where, by related sections, the income is to be taxed to the trust or its beneficiaries, we do not perceive that the section presents any question so comparable to that now before us as to affect our decision. We are concerned here with a question to which Congress has given no answer in the words of the statute, and it must be decided in conformity to the course of judicial decision applicable to a unified scheme of taxation of gifts whether made *inter vivos* or at death. If Congress, for the purpose of taxing income, has defined precisely the amount of control over the income which it deems equivalent to ownership of it, that definition is controlling on the courts even though without it they might reach a different conclusion, and even though retention of a lesser degree of control be deemed to

[2] See references to Congressional Record, Footnote 1.

render a transfer incomplete for the purpose of laying gift and death taxes.

The question remains whether the construction of the statute which we conclude is to be derived from its language and history, should be modified because of the force of treasury regulations or administrative practice. Article I of Regulations 67, under the 1924 Act (adopted without any change of present significance in Article III, Regulations 79, under the 1932 Act) provides that the creation of a trust where the grantor retains the power to revest in himself title to the corpus of the trust does not constitute a gift subject to the tax and declares that "where the power retained by the grantor to revest in himself title to the corpus is not exercised, a taxable transfer will be treated as taking place in the year in which such power is terminated". Petitioner urges that the regulation is in terms applicable to the trust presently involved because it was subject to a power of revocation in favor of the donor before the enactment of the gift tax which was later relinquished. But we think, as the court below thought, that the regulation was not directed to the case of the relinquishment of a reserved power to select new beneficiaries other than the donor and did not purport to lay down any rule for cases where there was a reserved power different from or in addition to the power to revest the title in the donor. At most the regulation is ambiguous and without persuasive force in determining the true construction of the statute. *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 16, 20. The amended regulation of 1936 under the 1932 Act, Art. III, Reg. 79, removed the ambiguity by declaring that the gift is complete and subject to the tax when "the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself". But this regulation is by its terms applicable only to gifts made after June 6, 1932 and is of significance here only so far as it is declaratory of the correct construction of the 1924 Act.

Petitioner also insists that the construction of the statute for which he contends is sustained by the administrative practice. That practice is not disclosed by any published Treasury rulings or decisions and our only source of information on the subject is a stipulation appearing in the record. It states that in the administration of the gift tax under the 1924 and 1932 Acts and until the

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decision in the *Hesslein* case it was "the uniform practice of the Commissioner of Internal Revenue in adjusting cases of the character of that here involved to treat the taxable transfer subject to gift tax as occurring when the transferor relinquished all power to revest in himself title to the property constituting the subject of the transfer"; and that three hundred cases "of such character" have been closed or adjusted in conformity to this practice.

This definition of the practice appears as a part of a stipulation of facts setting forth in some 126 printed pages the original trust deed of December 24, 1913, and thirteen modifications of it between that date and the final relinquishment of the power of modification on August 20, 1924. They reveal a varied and extensive power of control by the donor over the disposition of the trust property which survived the relinquishment, in 1919, of the power of revocation for his own benefit, and with which he finally parted after enactment of the gift tax. The description of the practice as that resorted to in adjusting "cases of the character of that here involved", presupposes some knowledge on our part of what the signers of the stipulation regarded as the salient features of the present case which, although not specified by the stipulation, were necessarily embraced in the practice. Administrative practice, to be accepted as guiding or controlling judicial decision, must at least be defined with sufficient certainty to define the scope of the decision. If relinquishment of the power of revocation mentioned by the stipulation was of controlling significance in defining the practice, that circumstance was not present in the *Hesslein* case or in the *Humphreys* case. Whether in any of the three hundred cases mentioned in the stipulation the relinquishment of the power of revocation was followed by the relinquishment *inter vivos* of a power of changing the beneficiaries like that in this case, does not appear.

Such a stipulated definition of the practice is too vague and indefinite to afford a proper basis for a judicial decision which undertakes to state the construction of the statute in terms of the practice. Moreover, if we regard the stipulation as agreeing merely that the legal questions involved in the present case have uniformly been settled administratively in favor of the contention now made by the petitioner, it involves conclusions of law of the stipulators, both

with respect to the legal issues in the present case and those resolved by the practice. We are not bound to accept, as controlling, stipulations as to questions of law. *Swift & Co.* v. *Hocking Valley Railway Co.*, 243 U. S. 281, 289.

Without attempting to say what the administrative practice has actually been we may, for present purposes, make the assumption most favorable to the taxpayer in this case that the practice was as stated by the Government in its brief in the *Humphreys* case, viz., that until the decision in the *Hesslein* case "the Bureau consistently took the position that the gift tax applied to a transfer in trust where the grantor reserved the right to modify the trust but no right to vest title in himself."

But the record here shows that no such practice was recognized as controlling in 1935 when the present case first received the attention of the Bureau. On February 21, 1935, the Assistant General Counsel gave an opinion reviewing at length the facts of the present case and the applicable principles of law, and concluded on the reasoning and authority of the *Guggenheim* and *Porter* cases that the gift was not complete and taxable until the relinquishment in August, 1924 of the power to modify the trust by the selection of new beneficiaries. In April, 1935, the matter was reconsidered and a new opinion was given which was finally adopted by the assistant secretary who had intervened in the case. This opinion reversed the earlier one on the authority of the *Guggenheim* case. It was at pains to point out that in that case the Court had held that the relinquishment of the power of revocation was a taxable gift but it made no mention of the fact that there, unlike the present case, there was no power of modification which survived the relinquishment of the power of revocation, which was crucial in the *Porter* case. Neither opinion rested upon or made any mention of any practice affecting cases where such a power of modification is reserved. After the decision in the *Hesslein* case the ruling of the Bureau in this case was again reversed and notice of deficiency sent to the taxpayer.

From this record it is apparent that there was no established administrative practice before the opinion of April, 1935,[3] and

[3] In the petition for certiorari filed in November, 1937, in Hesslein v. Hoey (No. 556); the government asserted that the 300 cases referred to in the stipulation in this case had been decided so recently that the time for filing claims for refunds had not expired.

if the practice was adopted then it was because of a mistaken departmental ruling of law based on an obvious misinterpretation of the decisions in the *Porter* and *Guggenheim* cases.

Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice does not conflict with other provisions of the statute and is not so inconsistent with applicable decisions of the courts as to produce inconsistency and confusion in the administration of the law. Such a choice, in practice, of one of two possible constructions of a statute by those who are expert in the field and specially informed as to administrative needs and convenience, tends to the wise interpretation and just administration of the laws. This is the more so when reliance has been placed on the practice by those affected by it.

But courts are not bound to accept the administrative construction of a statute regardless of consequences, even when disclosed in the form of rulings. See *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 468. Here the practice has not been revealed by any published rulings or action of the Department on which taxpayers could have relied. The taxpayers in the present cases are contending for different rulings. In *Harriet Rosenau*, 37 B. T. A. (1938), 468 as in the *Humphreys* case, the taxpayer contended that the date when the power to change the beneficiary is renounced is controlling. The petitioner here, who contends that the date of relinquishment of the power of revocation is controlling, rather than the date of surrender of power of modification, set up his trust and relinquished the power of revocation before the gift tax was enacted. The reenactment of the gift tax statute by the 1932 Act can not be said to be a legislative approval of the practice which had not been disclosed by Treasury regulation, ruling or decision, and which does not appear to have been established before the adoption of the 1932 Act. Cf. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273; *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 468.

The very purpose sought to be accomplished by judicial acceptance of an administrative practice would be defeated if we were to regard the present practice as controlling. If a practice is to be accepted because of the superior knowledge of administrative officers of the administrative needs and convenience, see *Brewster* v. *Gage*,

280 U. S. 327, 336, there is no such reason for its acceptance here. The Government by taking no position confesses that it is unable to say how administrative need and convenience will best be served. If, as we have held, we may reject an established administrative practice when it conflicts with an earlier one and is not supported by valid reasons, see *Burnet* v. *Chicago Portrait Co.*, ~~258~~ U. S. 1, 16, we should be equally free to reject the practice when it conflicts with our own decisions. 285 A change of practice to conform to judicial decision, such as has occurred since the decision in the *Hesslein case*, or to meet administrative exigencies, will be accepted as controlling when consistent with our decisions. *Morrissey* v. *Commissioner*, 296 U. S. 344, 354. Here we have an added, and we think conclusive reason for rejecting the earlier practice and accepting the later. The earlier, because in sharp conflict with our own decisions, as we have already indicated, cannot be continued without the perpetuation of inconsistency and confusion comparable to that of which the Government asks to be relieved by our decision.

Affirmed.

Mr. Justice Butler took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.